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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RALPH MILLS, *Petitioner,*

v.

STATE OF MARYLAND, *Respondent,*

On Writ Of Certiorari To The Court Of Appeals Of Maryland

PETITIONER'S BRIEF

ALAN H. MURRELL
Public Defender of Maryland
GEORGE E. BURNS, JR.*
Assistant Public Defender
Appellate Division, 6th Flr.
201 St. Paul Place
Baltimore, Maryland 21202
(301) 333-4842
MICHAEL R. BRAUDES
Assistant Public Defender
JULIA DOYLE BERNHARDT
Assistant Public Defender
MARK COLVIN
Assistant Public Defender
JOSE' FELIPE' ANDERSON
Assistant Public Defender
Counsel for Petitioner
**Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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QUESTIONS PRESENTED

1. May the Maryland Court of Appeals place a strained and unrealistic construction upon the Maryland death penalty statute in order to defeat a contention that the statute is unconstitutionally mandatory in its application?

2. Was the Maryland death penalty statute applied to Petitioner's case in an unconstitutionally mandatory manner?

3. Must Petitioner's sentence of death be vacated because of the admission of victim impact evidence?

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OPINION BELOW

The opinion of the Court of Appeals of Maryland is reported at 310 Md. 33, 527 A.2d 3 (1987), and is reproduced in the Joint Appendix at 109.

JURISDICTION

The opinion of the Court of Appeals of Maryland was filed on June 25, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE

The following are set forth in the Appendix to this Brief:

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendments VIII, XIV.

STATUTES

Md. Code (1957, 1982 Repl. Vol., 1987 Cum. Supp.), Art. 27, §§ 412, 413, 414; Art. 41, § 4-609(c).

RULE

Maryland Rules of Procedure, Former Rule 4-343, Rule 4-343 as amended.

STATEMENT OF THE CASE

Petitioner, Ralph Mills, was tried by a jury in the Circuit Court for Allegany County, Maryland, and convicted of first-degree murder. The same jury sentenced Petitioner to death. The Court of Appeals of Maryland affirmed Petitioner's conviction and sentence, with one judge concurring in the result and one judge dissenting. On December 7, 1987, this Court issued a writ of certiorari.

At trial, the State adduced evidence that on August 6, 1984, while an inmate at the Maryland Correctional Institution in Hagerstown, Maryland, Petitioner stabbed to death his cell-mate Paul Robin Brown with a "shank" or home-made knife.

The Operation Of The Maryland Death Penalty Law

Under Art. 27, § 413 of the Maryland Code, the death penalty may be sought by the prosecution if the defendant is convicted of first-degree murder. After conviction, a separate sentencing proceeding is conducted. At that hearing, the prosecution must prove one or more statutory aggravating circumstances beyond a reasonable doubt; if no aggravating circumstance is established, a life sentence is imposed. If one or more aggravating circumstances are established, the statute places upon the defendant the burden of establishing by a preponderance of the evidence one or more mitigating circumstances. If the sentencer[1] finds that one or more aggravating circumstances exist, but that no mitigating circumstance has been proved by the defense, Art. 27, § 413(h) mandates that the penalty must be death, without any further weighing of circumstances. If the sentencer finds that both aggravating and mitigating circumstances exist, section 413(h) mandates that "it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances."[2] If the mitigating circumstances do not outweigh the aggravating circumstances, "the sentence shall be death." Art. 27, § 413(h)(2).

[1] The defendant may elect to be sentenced by the judge or jury which participated in the guilt or innocence phase of the prosecution.

[2] The Court of Appeals has held that this language places the burden of persuasion on the State. *Foster* v. *State*, 304 Md. 439, 499 A.2d 1236 (1985).

The statute is implemented by a sentencing verdict form, called a "Findings and Sentencing Determination" form, which instructs the sentencer in the determinations that it must make with respect to aggravating circumstances, mitigating circumstances, and the consequences of its determinations on these matters. The form is mandated by the Maryland Rules of Procedure, Rule 4-343; the form as completed by the jury that sentenced Petitioner appears in the Joint Appendix at J.A. 99.

The form is divided into sections, with Section I listing aggravating circumstances and Section II listing mitigating circumstances. The sentencer is instructed that if one or more of the aggravating circumstances in Section I are marked "yes", then Section II is to be completed. The form goes on to advise that "If Section II was completed and all of the answers were marked "no" [indicating that the jury found one or more aggravating circumstances but no mitigating circumstances], then enter "Death"." Until the form was substantially revised in light of the opinion of the Court of Appeals in this case,[3] the form called for a "yes" or "no" response to each aggravating or mitigating circumstance but made no specific provision for a situation where there was not unanimous agreement as to a specific mitigating circumstance.

The Sentencing Proceeding In Petitioner's Case

The jury found a single aggravating circumstance—that "[t]he defendant committed the murder at a time

[3] The revised form, Maryland Rule 4-343 (as amended, 1987) appears in the Appendix to this Brief at Apx. 21a.

when confined in any correctional institution." Art. 27, § 413(d)(2).

At the sentencing hearing, evidence was adduced from which the jury could have found a number of mitigating circumstances:

1. Petitioner's youthful age (20).
2. Petitioner's low I.Q.
3. The termination of Petitioner's education in the sixth grade.
4. Petitioner's psychological and emotional problems, and the failure of society to adequately provide care and treatment.
5. The arbitrary administration of the death penalty, resulting in a situation where some individuals face the possibility of execution while equally culpable individuals do not.
6. Doubt regarding the circumstances leading up to the stabbing of Paul Brown.
7 The unlikelihood that Petitioner will be a continuing threat to society (§ 413(g)(7)).[4] (J.A. 87-93.)

The jury was instructed that it could consider mitigating circumstances only if it reached unanimous agreement. (J.A. 69, 73.)

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[4] In addition to these matters, the record also reflects Petitioner's involvement in drugs. (J.A. 52.) Although defense counsel did not argue that this was a mitigating circumstance, under Maryland law the sentencer is free to find mitigating factors not articulated by the defense in argument. *White* v. *State*, 300 Md. 719, 740, 481 A.2d 201 (1984).

The jury marked "no" for each mitigating circumstance and sentenced Petitioner to death.

Victim Impact Evidence

In his opening statement, the prosecutor argued to the jury:

> But you haven't heard that much about Paul Brown. And in particular. you haven't heard anything about the victims of this murder. You haven't heard anything about his surviving relatives and how they feel.
>
> Now under the law I can't call them to the stand. But under the law I can make available to you and you can inspect, you can read through the entire thing what's called a victim impact statement. And what this is is essentially a letter. It's actually a summary of a conversation between the victim, Paul Brown's, surviving brother and his wife, who is Paul Brown's sister-in-law, and a lady who works with the State's Attorney's Office in Hagerstown who is what is known as the victim witness coordinator. And she had a conversation with them about how they feel, about how Paul Brown's brother feels now that his brother is dead. And that's going to be something that you're going to have to consider when you're deciding what to do with the penalty in this case. And I believe there's no one who would question that that's right. Because for a long time the law in this country and the criminal justice system in this country was getting away from victims, and they were not being considered properly. And I want you to take that very seriously as everything else. I want you to include that in your deliberations when you're deciding what to do. (J.A. 11-12.)

Shortly thereafter, the prosecutor referred to himself "as the only person available to talk for Paul Brown and his surviving relatives." (J.A. 13.)

In offering into evidence the letter to which he had referred, the prosecutor asked the court clerk to mark "the victim impact statement." (J.A. 14.) Defense counsel stated that he had no objection, and the document was admitted as State's sentencing exhibit 2.

During closing argument, the prosecutor read the statement to the jury:

> And I'm now going to read you something which you will also be able to read for yourself, but which I believe . . . the State believes is very meaningful and proper. Recall my opening statement on the sentencing phase. For a long time the law was getting away from the purpose of the criminal justice system. Not just to enforce the law, but also to punish those who leave behind them victims. You never heard much about the victims. I can't call them . . . by law I can't call them to the stand to tell you how they feel. By law I can't call the surviving relatives of Paul Brown to tell you how they feel about the fact that Paul Brown isn't around any more, and about the fact that he was murdered. But what I can do is this. I can read you this victim impact statement, and I'm going to do it.
>
> This is a summary of an interview with Paul Brown's brother Thomas and his wife Jean. You remember Jean who testified and had to identify Paul Brown from one of the photographs which is in evidence. This is what it says.
>
> "Paul and Thomas Brown came from a family of six. At a very young age, they were removed from their parents' custody because of neglect and placed in separate foster homes. Removal by the Department of Social Services was prompted by Paul being hospitalized at age four for anemia and malnutrition.
>
> "Paul was a hyperactive child and hard to handle, which resulted in a lot of beatings from his

> various guardians. He ran away constantly from the various homes in which he had been placed. After a while, Paul, at the age of fifteen, just started living on the streets. He was eventually sent to the Maryland Training School for Boys.
>
> "Paul never really had a home or a family as such. I . . ." Now this is his brother speaking. "I tried to keep in touch with Paul by writing and visiting him whenever possible. I always had good homes and a good life, and always felt guilty that there was nothing I could do to help Paul. After all, I was only one year older than he. Paul was a good person who had a tough life, a lot of bad breaks, no family, no home, nobody to really give him a chance. I sometimes think he felt more secure in prison, because he had no one on the outside. Sure he committed crimes. But he wasn't violent. He did what he had to do to survive, and he got involved with a lot of bad people." And that is what is in the victim impact statement. And it's for you to read. It's part of the record in this case.

(J.A. ____.)

SUMMARY OF ARGUMENT

I. & II.

The question of whether the Maryland Legislature may constitutionally require unanimous agreement on mitigating circumstances must be considered in historical context. Historically, the requirement of unanimity has always been for the protection of the defendant.

Only by permitting the sentencer to consider all relevant evidence can a capital sentencing scheme narrow in a fair manner the class of defendants deserving the ultimate punishment. In a capital case, because of the qualitative difference between death and other punishments, it is of vital importance that the decision to impose death be, and

appear to be, based on reason rather than caprice or emotion. Thus, the severity of the sentence mandates careful scrutiny in the review of colorable claims of error. With these considerations in mind, it is difficult to imagine a system more arbitrary than one where a single juror may dictate a sentence of death. The result that a single juror may preclude meaningful use of mitigating circumstances is equally unjustifiable. Solving the problem through statutory interpretation, the Court of Appeals construed the statute to mean that where one or more jurors find that a mitigating circumstance exists, and it is not outweighed by the aggravating circumstance or circumstances, a life sentence must be imposed. Implicit in this holding is the clearly correct conclusion that it is unconstitutional to require unanimity in finding mitigating circumstances.

This construction of the statute, however, did not govern the actual deliberations of the jury in this case. The jury below was instructed that mitigating circumstances could be considered only if all twelve jurors were persuaded of the existence of a particular mitigating circumstance. Thus, it could not have applied the Court of Appeals' interpretation of the statute. In addition, the sentencing verdict form that guided the jury's deliberations also made provisions only for unanimous findings on mitigating circumstances.

The question in this case is what a reasonable juror would have understood the instructions to mean. The only way in which a reasonable jury could have understood the instructions in this case was that in order to be considered in the weighing process, a mitigating circumstance must be the subject of unanimous agreement. The trial judge's failure to properly instruct the jury as to the exercise of

its statutory discretion denied Petitioner due process of law.

II.

Victim impact evidence is irrelevant to a capital sentencing decision and is, therefore, inadmissible. The Court of Appeals in this case held that evidence adduced at the sentencing hearing describing the personal qualities of the victim was not victim impact evidence. This holding is inconsistent with this Court's decision in *Booth* v. *Maryland*, 482 U.S. ___, 107 S.Ct. 2529, 2533 (1987).

ARGUMENT

I. & II. THE MARYLAND DEATH PENALTY STATUTE WAS APPLIED TO PETITIONER'S CASE IN AN UNCONSTITUTIONALLY MANDATORY MANNER.

The underlying question is whether the Maryland Legislature may constitutionally require unanimous agreement by the jurors before any mitigating circumstance may be considered in the weighing process. The question, of course, must be considered in historical context.

> The rule which required unanimity is, I think, easily explained historically, and easily justified on grounds of expediency. The historical explanation appears from the passage already quoted from Bracton, Britton, and other early authorities. The jurors were required to be unanimous because they were witnesses, and the rule was that twelve witnesses, or persons taken as witnesses, must swear to the prisoner's guilt before he could be convicted.
>
> The justification of the rule, now that the character of the jury has changed from that of witnesses to that of judges of fact, seems to me to be that it is a direct

> consequence of the principle that no one is to be convicted of a crime unless his guilt is proven beyond all reasonable doubt. How can it be alleged that condition has been fulfilled so long as some of the judges by whom the matter is to be determined do in fact doubt?

J. Stephen, 1 *A History of the Criminal Law of England* 304-305 (1983). Although other explanations for the rule of unanimity have been suggested, *see Apodaca* v. *Oregon*, 406 U.S. 404, 407 n.2 (1972), it has never been doubted that the requirement has always been for the *protection of the defendant*. A procedure where the requirement of unanimity benefits the prosecution thus begins life as a historical curiosity.

The purpose of capital sentencing procedures is to narrow in a fair and controlled manner the class of defendants to those deserving the ultimate punishment. This Court has repeatedly held that this purpose can be achieved only by permitting the sentencer to consider all relevant mitigating circumstances and evidence. *Skipper* v. *South Carolina*, 476 U.S. ___, 106 S.Ct. 1669 (1986). *See also Hitchcock* v. *Dugger*, ___ U.S. ___, 107 S.Ct. 1821 (1987); *Sumner* v. *Shuman*, 483 U.S. ___, 107 S.Ct. 2716 (1987); *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982); *Lockett* v. *Ohio*, 438 U.S. 586 (1978).

The standard of review for determining whether a statute meets the foregoing requirements was set forth in *Zant* v. *Stephens*, 462 U.S. 862, 884-85 (1983):

> On the other hand, because there is a qualitative difference between death and any other permissible form of punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Thus, although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error.

(Citations omitted.)

It is with the foregoing considerations in mind that the requirement that mitigating circumstances must be the result of unanimous agreement must be analyzed. A single practical example of the requirement will suffice. If eleven jurors agree that there are six mitigating circumstances, the result is that no mitigating circumstance is found. Consequently, there is nothing to weigh against any aggravating circumstance found and the judgment is death even though eleven jurors think the death penalty wholly inappropriate.[5]

It is difficult to imagine a system more arbitrary than one where a single juror may dictate a sentence of death.[6]

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[5] In Maryland,

> [a] sentencing authority, unconvinced that death is appropriate, may list as a mitigating circumstance whatever factor or factors may have led to this conclusion, irrespective of what the defendant produced or argued. If the sentencing authority perceives anything relating to the defendant or the crime which causes it to believe that death may not be appropriate, it may treat such factor as a mitigating circumstance and decide that it outweighs the aggravating circumstances.

Foster v. *State*, 304 Md. 439, 474-475, 499 A.2d 1236 (1985), *cert. denied*, 106 S.Ct. 3310 (1986). The problem is that this mitigating circumstance, like any other mitigating circumstance, could be vetoed by a single juror.

[6] The suggestion that a single juror should have the power to impose the death penalty has been firmly rejected even without resort to the Constitution. Thus, where the jury was to decide the penalty and could preclude death by a recommendation of leniency,

The result that a single juror may preclude meaningful use of mitigating circumstances is equally unjustifiable. The price of failure is not a deadlocked jury and retrial as in any other proceeding, but, rather, death. The Court of Appeals avoided this problem through statutory interpretation. It construed the statute to mean that where one or more jurors find that a mitigating circumstance exists, and it is not outweighed by the aggravating circumstance or circumstances, a life sentence must be imposed. *See also Jones* v. *State*, 310 Md. 569, 599-604, 530 A.2d 743 (1987). Implicit in the resolution of the case by the majority of the Court of Appeals is the holding that a requirement of unanimity in finding mitigating circumstances is unconstitutional. This conclusion is clearly correct.

This construction of the statute, however, did not govern the actual deliberations of the jury which sentenced Petitioner to die. Those deliberations were controlled by jury instructions and a sentencing determination form which permitted mitigating circumstances to be considered only if all twelve jurors were persuaded of the existence of a particular mitigating circumstance.

Initially, the trial judge instructed the jury that the instructions "are binding upon you, and you must absolutely follow them in making your findings and determina-

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the New Jersey Supreme Court refused to hold that such recommendation must be unanimous.

> We do not believe the Legislature intended that a man should go to his doom because one juror disagreed with eleven who thought life imprisonment was the just penalty.

State v. *Reynolds*, 41 N.J. 163, 187, 195 A.2d 449 (1963), *cert. denied*, 377 U.S. 1000 (1964). See also *Andres* v. *United States*, 333 U.S. 740 (1948).

tions as to the sentence in this case." (J.A. 68.) The jurors were then directed to consider mitigating circumstances only if they reached unanimous agreement.

> Let me remind you that in reaching your determination *as to any of the issues raised by the case* and presented to you on this sentencing form your verdict must be *unanimous;* that is, all twelve of you must agree.

(J.A. 69.) (Emphasis added.) Subsequently, after listing the possible mitigating circumstances, the trial court reiterated the same point:

> Again let me stress the requirement of *unanimity,* that is *your finding under section two [mitigating circumstances]* and your findings under section three [weighing of mitigating against aggravating circumstances] must be one in which all twelve of you agree.

(J.A. 73.) (Emphasis added.)

The court's instructions did not provide for consideration of evidence in mitigation if eleven or fewer jurors were persuaded of the existence and force of such evidence. The jury was not instructed that it should impose a death sentence only if it found that the aggravating circumstance was sufficiently weighty to justify that sanction nor that death should be imposed only if it were justified under all the facts and circumstances. Thus, unless the jury ignored the instructions requiring a unanimous finding of mitigating circumstances, it could not have applied the Court of Appeals' interpretation of the statute. *See Opper* v. *United States*, 348 U.S. 84, 95 (1954) ("Our theory of trial relies upon the ability of a jury to follow instructions."); *Blumenthal* v. *United States*, 332 U.S. 539, 553 (1947) (It cannot be assumed that the jury

"misunderstood or disobeyed" an unambiguous instruction from the trial judge.)[7]

The sentencing verdict form that guided the jury's deliberations also made provision only for a unanimous finding that a mitigating circumstance existed. Section II of the form begins with the following instruction:

> Based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked "yes" has been proven to exist by a preponderance of the evidence and each mitigating circumstance marked "no" has not been proven by a preponderance of the evidence.

Following this instruction is a list of mitigating circumstances followed by a place to state "yes" and a place to state "no." There is no place, however, to provide an answer other than yes or no, and no suggestion that it is ever proper to leave a section of the form blank. Therefore, as was pointed out by the dissent below, the

> jury in this case was not informed, by instruction or by the sentencing form, of the interpretation of the statute announced for the first time today. The jurors may well have believed their answer of "no" meant that they could not unanimously agree that a mitigating circumstance had been proven. Never were they told that if they disagreed, they could leave the answer blank and proceed. Instead, they were told that "[y]ou must answer yes or no as to each of those circumstances."

(J.A. 170-171.)

The conclusion that a divided vote upon a particular mitigating circumstance results in its complete exclusion

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[7] Maryland law similarly recognizes the binding force of jury instructions. *See, e.g., State* v. *Moulden*, 292 Md. 666, 678 and n.8, 441 A.2d 699 (1982) ("Our legal system necessarily proceeds on the assumption that jurors will follow the trial judge's instructions . . .").

from consideration is confirmed by reviewing the sentencing forms completed by juries in past capital cases in Maryland, and by contrasting those forms with the form that was promulgated on an emergency basis by the Court of Appeals after it rendered its decision in this case.[8] See Maryland Rule 4-343. On past forms every mitigating circumstance was marked either "yes" or "no." No space was ever left blank, and no form ever reflected a divided vote. It is improbable that every vote upon individual mitigating circumstances resulted in unanimous agreement. It follows that many of the "no" answers reflect a divided vote in which the individuals who were persuaded of the existence of a mitigating circumstance were prevented from giving it any consideration. Indeed, in two sentencing proceedings conducted since the decision in this case, when the jury was given the option of reporting non-unanimous votes on mitigating circumstances, it did so.[9]

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[8] The forms from past cases are collected in the Lodging for the Convenience of the Court (hereinafter cited as L. ____). The form utilized subsequent to the decision of the Court of Appeals appears at Apx. 21a. The forms are prepared pursuant to Maryland Rule 4-343, which provides that in all cases where the State seeks the death penalty and the defendant is convicted of first-degree murder, the trial judge shall prepare a report of the sentencing and transmit it to the Court of Appeals.

[9] In *State of Maryland* v. *Ronald Wooten-Bey*, Case No. C.T. 83-1497C, Circuit Court for Prince George's County, the jury responded to *six* mitigating factors (three statutory and three non-statutory) in this manner. (L. 229.)

In *State of Maryland* v. *Al Wayne Doering*, Case No. 86CR6128, Circuit Court for Baltimore County, the jury used a sentencing form that directed the jurors to leave the form blank with respect to a mitigating factor respecting which one or more, but less than all, of the jurors were persuaded. Significantly, the sentencing jury left

Implicitly recognizing the deficiency in the procedure by which Petitioner was sentenced, the Court of Appeals promulgated a new sentencing form on an emergency basis after its decision in the instant case. Unlike its predecessors, new Maryland Rule 4-343 provides the following possible response to each mitigating circumstance:

> After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

A new Section IV of the new form further provides:

> *Each individual juror* shall weigh the aggravating circumstances found unanimously to exist against any mitigating circumstances found unanimously to exist, *as well as any mitigating circumstances found by that individual juror to exist.*

(Emphasis added.) Such *individual* weighing of mitigating circumstances found by a juror *as an individual* was absent from the sentencing form utilized at Petitioner's hearing. Thus, it is impossible to conclude, as did the Court of Appeals, that the jury understood that mitigating circumstances not unanimously found could nevertheless be considered in the balancing process. Indeed, the form used by the jury in this case made no such provision.

As this Court noted in *Francis* v. *Franklin*, 471 U.S. 307, 315-16 (1985):

> The question . . . is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning. *Sandstrom* [v. *Montana*, 442 U.S. 510, 516-517 (1979)] (state court "is not the final authority on the interpretation which a jury could have given the instruction").

unmarked the mitigating circumstance relating to the impaired mental capacity of the defendant, suggesting a divided vote on that issue. (L. 221).

The only way in which a reasonable jury could have understood the instructions on mitigating circumstances given in this case was that in order to be considered in the weighing process, the circumstance must be one upon which the jury unanimously agreed. Thus, the conclusion of the Court of Appeals that the jury in this case sentenced Petitioner in accordance with the interpretation of the statute announced below is without foundation.[10]

[10] On a prior occasion, the Court of Appeals redrafted the statute to defeat a constitutional challenge. At issue was the provision of the statute, Art. 27, § 413(h), that allocates the ultimate burden of proof on weighing aggravating against mitigating circumstances. The statute provides:

> (h) Weighing mitigating and aggravating circumstances.—(1) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances.
>
> (2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death.
>
> (3) If it finds that the mitigating circumstances outweigh the aggravating circumstances, the sentence shall be imprisonment for life.

Capital defendants in Maryland consistently challenged this provision on the ground that it unconstitutionally allocates the burden of proof to the defendant. The Attorney General of Maryland, who represents the State on appeal in capital cases, conceded that the statute places the burden upon the defense and argued that the statute is nevertheless constitutional. Brief of Appellee in *Johnson* v. *State*, 292 Md. 405, 439 A.2d 542 (1982), at 8-9. (L. 236).

Notwithstanding the plain language of the statute and the conclusion of counsel on both sides, the Court of Appeals construed the statute to allocate the burden to the State. *Tichnell* v. *State*, 287 Md.

The circumstances presented here are similar to those considered in *Hitchcock* v. *Dugger, supra*. Hitchcock argued that at the time he was sentenced, the Florida death penalty statute had been interpreted by the Florida Supreme Court to prohibit the sentencing jury and judge from considering mitigating circumstances not specifically enumerated in the statute and that the sentencing judge assumed such a prohibition and instructed the jury accordingly. The State contended that the petitioner had misinterpreted the decision of the Florida Supreme Court and noted that the Court had subsequently interpreted the statute so as not to prohibit sentencers from considering mitigating circumstances not enumerated in the statute. This Court looked not to the interpretation given the statute by the Florida Supreme Court, but to "the sentencing proceedings actually conducted" in the case. Because the record showed "that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances," the proceedings did not comport with the requirement that the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence. 107 S.Ct. at 1824. *See also California* v. *Brown*, ___ U.S. ___, 107 S.Ct. 837, 841-42 (1987) (O'Connor, J., concurring) (Jury instructions, in combination with prosecutor's closing argument, may create a legitimate basis for ambiguity concerning the factors actually considered by the jury.)

695, 730, 415 A.2d 830 (1980); *Booth* v. *State*, 306 Md. 172, 225-226 n.14, 507 A.2d 1098 (1986), *vacated*, 107 S.Ct. 2529 (1987); *Foster* v. *State*, 304 Md. 439, 475, 499 A.2d 1236 (1985), *cert. denied*, 106 S.Ct. 3310 (1986); *Johnson* v. *State*, 292 Md. 405, 436, 439 A.2d 542 (1982). *See also Evans* v. *State*, 304 Md. 487, 536 and n.18, 499 A.2d 1261 (1985), *cert. denied*, 106 S.Ct. 3310 (1986).

A similar problem was also before the Court in *Andres* v. *United States*, 333 U.S. 740 (1948). The petitioner had been convicted of first degree murder and sentenced to death under a statute which provided for capital punishment in cases of murder in the first degree unless the jury qualified its verdict "without capital punishment." The issue was the impact of a non-unanimous jury decision upon whether the verdict should be so qualified. This Court refused to read the statute in question to require that a "unanimous jury alleviate its rigor" and concluded that the jury must unanimously find that the sentence of death should be imposed. This Court reversed the judgment because the jury instructions on the effect of non-unanimity could have been misleading.

> That reasonable men might derive a meaning from the instructions given other than the proper meaning of § 567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused. The context of § 567 does not defy accurate and precise expression.* * * *
>
> As we are of the opinion that the instructions given on this issue did not fully protect the petitioner, the judgment of the lower court is reversed and the case remanded for a new trial.

Id. at 752.

In *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980), the petitioner was sentenced by a jury in accordance with an habitual offender statute later declared unconstitutional. When he sought to have his sentence set aside on appeal, his claim that the sentence was unconstitutional was rejected on the ground that he was not prejudiced because his sentence was within the range of punishment that could have been imposed. This Court reversed, finding that Hicks had been denied due process of law.

By statute in Oklahoma, a convicted defendant is entitled to have his punishment fixed by the jury ***. Had the members of the jury been correctly instructed in this case, they could have imposed any sentence of "not less than ten . . . years." *** The possibility that the jury would have returned a sentence of less than 40 years is thus substantial. It is, therefore, wholly incorrect to say that the petitioner could not have been prejudiced by the instruction requiring the jury to impose a 40-year prison sentence.

It is argued that all that is involved in this case is the denial of a procedural right of exclusively state concern. Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of State procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, *** and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.

Id. at 345-46. (Citations omitted.) As in the preceding cases, the trial judge's failure to properly instruct the jury as to the exercise of its statutory discretion denied Petitioner due process of law.[11]

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[11] To the extent that the holding of the Court of Appeals involves a reconstruction of the statute, that reconstruction does not eliminate the unconstitutionality of Petitioner's sentence. "[W]here an accused is tried under a broad construction of an Act which would make it unconstitutional, the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features of the Act . . . ." *Ashton* v. *Kentucky*, 384 U.S. 195, 198 (1966). The same principle applies to sentencing statutes. *Hicks*, *supra*, at 346-47. Thus, Petitioner's sentence, which was imposed without adequate guidance, is invalid. *Hicks*, *supra*. *See Bouie* v. *City of Columbia*, 378 U.S. 347, 353 (1964). Petitioner should have been afforded the benefit of the court's reconstruction. *Ivan V.* v. *City of New York*, 407 U.S. 203, 205 (1972).

A separate due process problem follows from the fact that the defense could not reasonably have anticipated that the statute would be interpreted as it was by the Court of Appeals. Thus, it would be unreasonable to expect the defense to request that the jury be instructed that non-unanimous mitigating circumstances were to be considered. As the defense was not given fair warning of the meaning of the statute, Petitioner was deprived of due process of law. *See Bouie* v. *City of Columbia*, 378 U.S. at 353.

III. PETITIONER'S SENTENCE OF DEATH WAS TAINTED BY THE ADMISSION OF VICTIM IMPACT EVIDENCE.

In *Booth* v. *Maryland*, 482 U.S. ___, 107 S.Ct. 2529, 2533 (1987), this Court held that victim impact evidence is "irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." The Court of Appeals in this case held that evidence adduced at the sentencing hearing describing the personal qualities of the victim was not victim impact evidence and, therefore, not inadmissible under *Booth*.

> In light of the Supreme Court's recent decision in *Booth* v. *Maryland*, ___ U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), we note that in the instant case, no "Victim Impact Statement" was introduced in evidence or even proffered. There was attached to the Division of Parole and Probation's investigation report a memorandum from Jane Christy of the victim/witness assistance program to the State's attorney, summarizing an interview with the victim's brother and sister-in-law. This memorandum was

admitted into evidence after Mill's counsel expressly informed the Court that he had read it and did not object to its admission. The memorandum stated in its entirety as follows:

> "Paul was a hyperactive child and hard to handle which resulted in a lot of beatings from his various guardians. He ran away constantly from the various homes in which he had been placed. After a while Paul, at the age of 15, just started living on the streets. He was eventually sent to the Maryland Training School for boys. Paul never really had a home or a family as such. 'I (Thomas Brown) tried to keep in touch with Paul by writing and visiting him whenever possible. I always had good homes and a good life and always felt so guilty that there was nothing I could do to help Paul. After all, I was only one year older than he.'
>
> "'Paul was a good person who had a tough life, a lot of bad breaks, no family, no home, nobody to really give him a chance. I sometimes think he felt more secure in prison, because he had no one on the outside. Sure, he committed crimes, but he wasn't violent. He did what he had to do to survive and he got involved with a lot of bad people."

This memorandum did not purport to be and did not fall within the statutory requirements of a victim impact statement. *See* Code (1957, 1986 Repl. Vol.), Art. 41, § 4-609(c). The memorandum did not describe the impact of the crime on the victim's family or the "family members' opinion and characterizations" of the crime and the defendant. *Booth* v. *Maryland, supra*. As defense counsel recognized at the sentencing proceeding in this case, the content of this statement would not inflame a jury or otherwise prejudice Mills. Consequently, the memorandum did not constitute the "victim impact evidence" found constitutionally inadmissible in *Booth* v. *Maryland, supra*.

(J.A. 146-147 n.14).[12]

The difficulty with the court's holding is that the court fails to mention that a third type of evidence was held inadmissible in *Booth:* evidence about the "personal characteristics of the victims." 107 S.Ct. at 2533.

> The focus of a VIS, however, is not on the defendant, but on the *character and reputation of the victim* and the effect on his family. These circumstances may be wholly unrelated to the blameworthiness of a particular defendant.
>
> * * *
>
> Nor is there any justification for permitting such a decision to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character. This type of information does not provide a "principled way to distinguish [cases] in which the death penalty was imposed, from the many cases in which it was not."
>
> We also note that it would be difficult—if not impossible—to provide a fair opportunity to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant. A threshold problem is that victim impact information is not easily susceptible to rebuttal. Presumably the defendant would have the right to cross-examine the declarants, but he rarely would be able to show that the family members have exaggerated the degree of sleeplessness, depression or emotional trauma suffered. Moreover, if the state is permitted to introduce evidence of the victim's personal qualities, it cannot

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[12] The prejudicial effect of this evidence was exacerbated by the prosecutor's argument. The prosecutor referred to the "surviving relatives" (J.A. 11); to "how Paul Brown's brother feels now that his brother is dead" (J.A. 12), and to "the surviving relatives of Paul Brown." (J.A. 85.)

> be doubted that the defendant also must be given the chance to rebut this evidence. Putting aside the strategic risks of attacking the victim's character before the jury, in appropriate cases the defendant presumably would be permitted to put on evidence that the victim was of dubious moral character, was unpopular, or was ostracized from his family. The prospect of a "mini-trial" on the victim's character is more than simply unappealing; it could well distract the sentencing jury from its constitutionally required task—determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime. We thus reject the contention that the presence or absence of emotional distress of the victim's family, *or the victim's personal characteristics*, are proper sentencing considerations in a capital case.

Id. at 2534-35. (Citations and footnotes omitted). The Court further noted,

> We are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions. Cf. *Furnam* v. *Georgia*, 408 U.S. 238, 242, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972) (Douglas, J., concurring).

Id. at 2534 n.8.

There is, therefore, no basis for the conclusion of the Court of Appeals that only evidence describing the impact of the crime on family members and evidence of their opinions and characterizations of the crime and the defendant are inadmissible under *Booth* while evidence of the victim's personal qualities is permitted. Under *Booth*, reversal is required.[13]

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[13] Although this issue was not raised at trial, nor, consequently, on appeal, it was addressed by the Court of Appeals. It is thus properly before this Court on certiorari. *Burch* v. *Louisiana*, 441 U.S. 130, 133 n.5 (1979).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the judgment of the court below.

Respectfully submitted,

ALAN H. MURRELL
Public Defender of Maryland
GEORGE E. BURNS, JR.*
Assistant Public Defender
Appellate Division, 6th Flr.
201 St. Paul Place
Baltimore, Maryland 21202
(301) 333-4842
MICHAEL R. BRAUDES
Assistant Public Defender
JULIA DOYLE BERNHARDT
Assistant Public Defender
MARK COLVIN
Assistant Public Defender
JOSE' FELIPE' ANDERSON
Assistant Public Defender
Counsel for Petitioner
**Counsel of Record*

APPENDIX

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APPENDIX

PERTINENT CONSTITUTIONAL PROVISIONS

Constitution of the United States

Amendment VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PERTINENT STATUTES

Maryland Code (1957, 1982 Repl. Vol.) Art. 27, § 412:

(a) *Designation of degree by court or jury.*—If a person is found guilty of murder, the court or jury that determined the person's guilt shall state in the verdict whether the person is guilty of murder in the first degree or murder in the second degree.

(b) *Penalty for first degree murder.*—Except as provided under subsection (f) of this section, a person found guilty of murder in the first degree shall be sentenced to death, imprisonment for life, or imprisonment for life without the possibility of parole. The sentence shall be imprisonment for life unless: (1)(i) the State notified the person in writing at least 30 days prior to trial that it intended to seek a sentence of death, and advised the person of each aggravating circumstance upon which it intended to rely, and (ii) a sentence of death is imposed in accordance with § 413; or (2) the State notified the person

in writing at least 30 days prior to trial that it intended to seek a sentence of imprisonment for life without the possibility of parole under § 412 or § 413 of this article.[1]

(c) *Penalty for second degree murder.*—A person found guilty of murder in the second degree shall be sentenced to imprisonment for not more than 30 years.

(d) *Court to determine possibility of parole.*—Except as provided by § 413 of this article, the court shall decide whether to impose a sentence of life imprisonment or life imprisonment without the possibility of parole.

(3) *"Imprisonment for life without the possibility of parole" defined.*—In this section, "imprisonment for life without the possibility of parole" means imprisonment for the natural life of an inmate under the custody of a correctional institution, including the Patuxent Institution.

(f) *Life imprisonment for defendants less than 18 years old.*—If a person found guilty of murder in the first degree was less than 18 years old at the time the murder was committed, the person shall be sentenced to imprisonment for life and may not be sentenced to death. (1978, ch. 3, §§ 1,2; 1987, chs. 164, 237, 626.)

Maryland Code (1957, 1982 Repl. Vol.) Art. 27, § 413:

(a) *Separate sentencing proceeding required.*—If a person is found guilty of murder in the first degree, and if the State had given the notice required under Sec. 412(b), a separate sentencing proceeding shall be conducted as soon as practicable after the trial has been completed to determine whether he shall be sentenced to death.

(b) *Before whom proceeding conducted.*—This proceeding shall be conducted:

(1) Before the jury that determined the defendant's guilt; or

(2) Before a jury impaneled for the purpose of the proceeding if:

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[1] The provisions relating to a sentence of life without parole became effective subsequent to Petitioner's sentencing.

(i) The defendant was convicted upon a plea of guilty;

(ii) The defendant was convicted after a trial before the court sitting without a jury;

(iii) The defendant was convicted after a trial before the court sitting without a jury;

(iv) Review of the original sentence of death by a court of competent jurisdiction has resulted in a remand for resentencing; or

(3) Before the court alone, if a jury sentencing proceeding is waived by the defendant.

(c) *Evidence; argument; instructions.*—(1) The following type of evidence is admissible in this proceeding:

(i) Evidence relating to any mitigating circumstance listed in subsection (g) of this section;

(ii) Evidence relating to any aggravating circumstance listed in subsection (d) of this section of which the State had notified the defendant pursuant to Section 412(b) of this article;

(iii) Evidence of any prior criminal convictions, pleas of guilty or nolo contendere, or the absence of such prior convictions or pleas, to the same extent admissible in other sentencing procedures;

(iv) Any presentence investigation report. However, any recommendation as to sentence contained in the report is not admissible; and

(v) Any other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements.

(2) The State and the defendant or his counsel may present argument for or against the sentence of death.

(3) After presentation of the evidence in a proceeding before a jury, in addition to any other appropriate instructions permitted by law, the court shall instruct the jury as to the findings it must make in order to determine whether the sentence shall be death, imprisonment for life without

the possibility of parole, or imprisonment for life, and the burden of proof applicable to these findings in accordance with subsection (f) or subsection of (h) of this section.

(d) *Consideration of aggravating circumstances.*—In determining the sentence, the court or jury, as the case may be, shall first consider whether, beyond a reasonable doubt, any of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer who was murdered while in the performance of his duties.

(2) The defendant committed the murder at a time when he was confined in any correctional institution.

(3) The defendant committed the murder in furtherance of an escape or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

(4) The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

(5) The victim was a child abducted in violation of § 2 of this article.

(6) The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.

(7) The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

(8) At the time of the murder, the defendant was under sentence of death or imprisonment for life.

(9) The defendant committed more than one offense or murder in the first degree arising out of the same incident.

(10) The defendant committed the murder while committing or attempting to commit a robbery, arson, rape, or sexual offense in the first degree.

(e) *Definitions.*—As used in this section, the following terms have the meanings indicated unless a contrary meaning is clearly intended from the context in which the term appears:

(1) The terms "defendant" and "person," except as those terms appear in subsection (d)(7), include only a principal in the first degree.

(2) The term "correctional institution" includes any institution for the detention or confinement of persons charged with or convicted of a crime, including Patuxent Institution, any institution for the detention or confinement of juveniles charged with or adjudicated as being delinquent, and any hospital in which the person was confined pursuant to an order of a court exercising criminal jurisdiction.

(3) (i) The term "law enforcement officer" has the meaning given in § 727 of Article 27.

(ii) The term "law enforcement officer," as used in subsection (d) of this section, includes:

1. An officer serving in a probationary status;

2. A parole and probation officer;

3. A law enforcement officer of a jurisdiction outside of Maryland; and

4. If the law enforcement officer is wearing the uniform worn by the law enforcement officer while acting in an official capacity or is prominently displaying his official badge or other insignia of office, a law enforcement officer privately employed as a security officer or special policeman under the provisions of Article 41, §§ 4-901 through 4-913 of the Code.

(4) "Imprisonment for life without the possibility of parole" means imprisonment for the natural life of an inmate under the custody of a correctional institution, including the Patuxent Institution.

(f) *Finding that no aggravating circumstances exist.*—If the court or jury does not find, beyond a reasonable doubt, that one or more of these aggravating circum-

stances exist, it shall state that conclusion in writing, and a sentence of death may not be imposed.

(g) *Consideration of mitigating circumstances.*—If the court or jury finds, beyond a reasonable doubt, that one or more of these aggravating circumstances exsit, it shall then consider whether, based upon a preponderance of the evidence, any of the following mitigating circumstances exist:

(1) The defendant has not previously (i) been found guilty of a crime of violence; (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

(2) The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

(3) The defendant acted under substantial duress, domination or provacation of another person, but not so substantial as to constitute a complete defense to the prosecution.

(4) The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder or emotional disturbance.

(5) The youthful age of the defendant at the time of the crime.

(6) The act of the defendant was not the sole proximate cause of the victim's death.

(7) It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(8) Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case.

(h) *Weighing mitigating and aggravating circumstances.*—(1) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances.

(2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death.

(3) If it finds that the mitigating circumstances outweigh the aggravating circumstances, a sentence of death may not be imposed.

(i) *Determination to be written and unanaimous.*—The determination of the court or jury shall be in writing, and, if a jury, shall be unanimous and shall be signed by the foreman.

(j) *Statements required in determination.*—The determination of the court or jury shall state, specifically:

(1) Which, if any, aggravating circumstances it finds to exist;

(2) Which, if any, mitigating circumstances it finds to exist;

(3) Whether any mitigating circumstances found under subsection (g) outweigh the aggravating circumstances found under subsection (d);

(4) Whether the aggravating circumstances found under subsection (d) are not outweighed by mitigating circumstances under subsection (g); and

(5) The sentence, determined in accordance with subsection (f) or (h).

(k) *Imposition of sentence.*—(1) If the jury determines that a sentence of death shall be imposed under the provisions of this section, then the court shall impose a sentence of death.

(2) If the jury, within a reasonable time, is not able to agree as to whether a sentence of death shall be imposed, the court may not impose a sentence of death.

(3) If the sentencing proceeding is conducted before a court without a jury, the court shall determine whether a sentence of death shall be imposed under the provisions of this section.

(4) If the court or jury determines that a sentence of death may not be imposed, and the State did not give the notice required under § 412(b) of this article of intention to seek a sentence of life imprisonment without the possibility of parole, the court shall impose a sentence of life imprisonment.

(5) If the State gives the notice required under § 412(b) of this article of intention to seek a sentence of imprisonment for life without the possisbility of parole but does not give notice of intention to seek the death penalty, the court shall conduct a separate sentencing proceeding as soon as practicable after the trial has been completed to determine whether to impose a sentence of imprisonment for life or imprisonment for life without the possibility of parole.

(6) If the State gives the notice required under § 412(b) of this article of intention to seek the death penalty in addition to the notice of intention to seek a sentence of imprisonment for life without the possibility of parole, and the court or jury determines that a sentence of death may not be imposed under the provisions of this section, that the court or jury shall determine whether to impose a sentence of imprisonment for life or imprisonment for life without the possibility of parole.

(7)(i) In determining whether to impose a sentence of imprisonment for life without the possibility of parole, a jury shall agree unanimously on the imposition of a sentence of imprisonment for life without the possibility of parole.

(ii) If the jury agrees unanimously to impose a sentence of imprisonment for life without the possibility of parole, the court shall impose a sentence of imprisonment for life without the possibility of parole.

(iii) If the jury, within a reasonable time, is not able to agree unanimously on the imposition of a sentence of imprisonment for life without the possibility of parole, the court shall dismiss the jury and impose a sentence of imprisonment for life.

(l) *Rules of procedure.*—The Court of Appeals may adopt rules of procedure to govern the conduct of a sentencing proceeding conducted pursuant to this section, including any forms to be used by the court or jury in making its written findings and determinations of sentence.

(m) *Alternate jurors.*—(1) A judge shall appoint at least 2 alternate jurors when impaneling a jury for any proceeding:

(i) In which the defendant is being tried for a crime for which the death penalty may be imposed; or

(ii) Which is held under the provisions of this section.

(2) The alternate jurors shall be retained during the length of the proceedings under such restrictions and regulations as the judge may impose.

(3)(i) If any juor dies, becomes incapacitated, or disqualified, or is discharged for any other reason before the jury begins its deliberations on sentencing, an alternate juror becomes a juror in the order in which selected, and serves in all respects as those selected on the regular trial panel.

(ii) An alternate juror may not replace a juror who is discharged during the actual deliberations of the jury on the guilt or innocence of the defendant, or on the issue of sentencing. (1978, ch. 3 §§ 1, 2; 1979, ch. 521; 1983, chs. 8. 296, 497; 1984, chs. 255, 652; 1987, chs, 237, 600.)

Art. 27, § 414:

(a) *Review by Court of Appeals required.*—Whenever the death penalty is imposed, and the judgment becomes final, the Court of Appeals shall review the sentence on the record.

(b) *Transmission of papers to Court of Appeals.*—The clerk of the trial court shall transmit to the Clerk of

the Court of Appeals the entire record and transcript of the sentencing proceeding within ten days after receipt of the transcript by the trial court. The clerk also shall transmit the written findings and determination of the court or jury and a report prepared by the trial court. The report shall be in the form of a standard questionnaire prepared and supplied by the Court of Appeals of Maryland and shall include a recommendation by the trial court as to whether or nor imposition of the sentence of death is justified in the case.

(c) *Briefs and oral argument.*—Both the State and the defendant may submit briefs and present oral argument within the time provided by the Court.

(d) *Consolidation of appeals.*—Any appeal from the verdict shall be consolidated in the Court of Appeals with the review of sentence.

(e) *Considerations by Court of Appeals.*—In addition to the consideration of any errors properly before the Court on appeal, the Court of Appeals shall consider the imposition of the death sentence. With regard to the sentence, the Court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether the evidence supports the jury's or court's finding of a statutory aggravating circumstance under § 413(d);

(3) Whether the evidence supports the jury's or court's finding that the aggravating circumstances are not outweighed by mitigating circumstances; and

(4) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(f) *Decision of Court of Appeals.*—(1) In addition to its review pursuant to any direct appeal, with regard to the death sentence, the Court shall:

(i) Affirm the sentence;

(ii) Set aside the sentence and remand the case for the conduct of a new sentencing proceeding under § 413; or

(iii) Set aside the sentence and remand for modification of the sentence to imprisonment for life.

(2) The Court shall include in its decision a reference to the similar cases which it considered.

(g) *Rules of procedure.*—The Court may adopt rules of procedure to provide for the expedited review of all death sentences pursuant to this section. (1978, ch. 3, §§ 1, 2.)

Art. 41, § 4-609(c) (in pertinent part):

(2)(i) The presentence investigation shall include a victim impact statement, if:

1. The defendant, in committing a felony, caused physical, psychological, or economic injury to the victim; or

2. The defendant, in committing a misdemeanor, caused serious physical injury or death to the victim.

(ii) If the court does not order a presentence investigation, the State's Attorney may prepare a victim impact statement to be submitted to the court and the defendant in accordance with the Maryland Rules of Procedure pertaining to presentence investigations.

(iii) The court shall consider the victim impact statement in determining the appropriate sentence, and in entering any order of restitution to the victim under Article 27, § 640(c) of the Code.

(3) A victim impact statement shall:

(i) Identify the victim of the offense;

(ii) Itemize any economic loss suffered by the victim as a result of the offense;

(iii) Identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;

(iv) Describe any change in the victim's personal welfare or familial relationships as a result of the offense;

(v) Identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and

(vi) Contain any other information related to the impact of the offense upon the victim or the victim's family that the court requires.

(4) If the victim is deceased, under a mental, physical, or legal disability, or otherwise unable to provide the information required under this section, the information may be obtained from the personal representative, guardian, or committee, or such family members as may be necessary.

(d) In any case in which the death penalty is requested under Article 27, § 412, a presentence investigation, including a victim impact statement, shall be completed by the Division of Parole and Probation, and shall be considered by the court or jury before whom the separate sentencing proceeding is conducted under Article 27, § 413. (An Code, 1951, § 103; 1939, § 86; 1939, ch. 406, § 55C; 1953, ch. 625, § 1; 1967, ch. 527; 1968, ch. 457, § 1; 1972, ch. 181, § 41; ch. 532; 1973, ch. 456; 1976, ch. 118; 1981, ch. 300; 1982, chs. 33, 494; ch. 820, § 1; 1983, chs. 297, 345; 1986, ch. 5, § 4.)

PERTINENT RULES OF PROCEDURE

Maryland Rules of Procedure, Former Rule 4-343:[2]

Rule 4-343. SENTENCING—PROCEDURE IN CAPITAL CASES

(a) **Applicability.**—This Rule applies whenever sentence is imposed under Code, Article 27, Sec. 413.

(b) **Statutory Sentencing Procedure.**—When a defendant has been found guilty of murder in the first degree and the State has given the notice required under Code, Article 27, Sec. 412(b), a separate sentencing proceeding shall be conducted as soon as practicable after the trial pursuant to the provisions of Code, Article 27, § 413.

(c) **Judge.**—Except as provided in Rule 4-361, the judge who presides at trial shall preside at the sentencing proceeding.

(d) **Allocution.**—Before sentence is determined, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement.

(e) **Written Findings and Determinations.**—The findings and determinations shall be made in writing in the following form:

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[2] This Appendix contains the Rule as it read prior to the decision of the Court of Appeals in this case, and the Rule as amended subsequent to that decision.

(CAPTION)

FINDINGS AND SENTENCING DETERMINATION

Section I

Based upon the evidence, we unanimously find that each of the following aggravating circumstances that is marked "yes" has been proven BEYOND A REASONABLE DOUBT. Each of the aggravating circumstances that has not been so proven is marked "no."

1. The victim was a law enforcement officer who was murdered while in the performance of the officer's duties.
☐ Yes ☐ No

2. The defendant committed the murder at a time when confined in a correctional institution.
☐ Yes ☐ No

3. The defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.
☐ Yes ☐ No

4. The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.
☐ Yes ☐ No

5. The victim was a child abducted in violation of Code, Article 27, Sec. 2.
☐ Yes ☐ No

6. The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.
☐ Yes ☐ No

7. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or

the promise of remuneration.
☐ Yes ☐ No

8. At the time of the murder, the defendant was under the sentence of death or imprisonment for life.
☐ Yes ☐ No

9. The defendant committed more than one offense of murder in the first degree arising out of the same incident.
☐ Yes ☐ No

10. The defendant committed the murder while committing or attempting to commit robbery, arson, rape in the first degree, or sexual offense in the first degree.
☐ Yes ☐ No

(If one or more of the above are marked "yes," complete Section II. If all of the above are marked "no," do not complete sections II and III.)

Section II

Based upon the evidence, we unanimously find that each of the following mitigating circumstances that is marked "yes" has been proven to exist by A PREPONDERANCE OF THE EVIDENCE. Each mitigating circumstances that has no been so proved is marked "no."

1. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, mayhem, murder, robbery, rape in the first or second degree, sexual offense in the first or second degree, manslaughter other than involuntary manslaughter, an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

The defendant previously (i) has not been found guilty of a crime of violence; and (ii) has not entered a plea of guilty or nolo contendere to a charge of a crime of violence; and (iii) has not been granted probation on stay of entry of judgment pursuant to a charge of crime of violence.
☐ Yes ☐ No

2. The victim was a participant in the defendant's conduct or consented to the act which caused the victim's

death.

☐ Yes ☐ No

3. The defendant acted under substantial duress, domination, or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.

☐ Yes ☐ No

4. The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance.

☐ Yes ☐ No

5. The defendant was of a youthful age at the time of the crime.

☐ Yes ☐ No

6. The act of the defendant was not the sole proximate cause of the victim's death.

☐ Yes ☐ No

7. It is unlikely that the defense will engage in further criminal activity that would constitute a continuing threat to society.

☐ Yes ☐ No

8. Other facts specifically set forth below constitute migitaging circumstances:

☐ Yes ☐ No

_____

_____

_____

_____

(Use reverse side if necessary)

(If one or more of the above Section II have been marked "yes," complete Section III. If all of the above Section II are marked "no," do not complete Section III.)

Section

Based on the evidence, we unanimously find that it has been proven by A PREPONDERANCE OF THE EVI-

DENCE that the mitigating circumstances marked "yes" in Section II outweigh the aggravating circumstances marked "yes" in Section I.

☐ Yes ☐ No

DETERMINATION OF SENTENCE

Enter the determination of sentence either "Life Imprisonment" or "Death" according to the following instructions:

1. If all of the answers in Section I are marked "no," enter "Life Imprisonment."

2. If Section III was completed and was marked "yes," enter "Life Imprisonment."

3. If Section II was completed and all of the answers were marked "no," then enter "Death."

4. If Section III was completed and was marked "no," enter "Death." We unanimously determine the sentence to be _____

_____	_____
Foreman	Juror 7
_____	_____
Juror 2	Juror 8
_____	_____
Juror 3	Juror 9
_____	_____
Juror 4	Juror 10
_____	_____
Juror 5	Juror 11
_____	_____
Juror 6	Juror 12

or _____
JUDGE

(f) **Advice of the Judge.**—At the time of imposing sentence, the judge shall advise the defendant of the right of appeal and the time allowed for the exercise of this right. The judge shall also advise a defendant who receives a sentence of death that (1) the sentence only will be

reviewed automatically by the Court of Appeals, and (2) the sentence will be stayed pending review of the sentence by the Court of Appeals and any appeal which the defendant may take.

(g) **Report of Judge.**—After sentence is imposed, the judge promptly shall prepare and send to the parties a report in the following form:

CAPTION

REPORT OF TRIAL JUDGE

I. Data Concerning Defendant

A. Date of Birth
B. Sex
C. Race
D. Address
E. Length of Time in Community
F. Reputation in Community
G. Family Situation and Background
1. Situation at time of offense (describe defendant's living situation including marital status and number and age of children)
2. Family history (describe family history including pertinent data about parents and siblings)
H. Education
I. Work Record
J. Prior Criminal Record and Institutional History (list any prior convictions, disposition, and periods of incarceration)
K. Military History
L. Pertinent Physical or Mental Characteristics or History
M. Other Significant Data About Defendant

II. Data Concerning Offense

A. Briefly describe facts of offense (include time, place, and manner of death; weapon, if any; other participants and nature of participation)
B. Was there any evidence that the defendant was under the influence of alcohol or drugs at the time of the offense? If so describe.

C. Did the defendant know the victim prior to the offense?
Yes ☐ No ☐
1. If so, describe relationship.
2. Did the prior relationship in any way precipitate the offense? If so, explain.
D. Did the victim's behavior in any way provoke the offense? If so, explain.
E. Data Concerning Victim
1. Name
2. Date of Birth
3. Sex
4. Race
5. Length of time in community
6. Reputation in community
F. Any Other Significant Data About Offense

III. A. Plea Entered by Defendant:
Not guilty ☐; guilty ☐;
not guilty by reason of insanity ☐
B. Mode of Trial:
Court ☐ Jury ☐
If there was a jury trial, did defendant challenge the jury selection or composition? If so, explain.
C. Counsel
1. Name
2. Address
3. Appointed or retained
(If more than one attorney represented defendant, provide data on each and include stage of proceeding at which the representation was furnished.)
D. Pre-Trial Publicity—Did defendant request a mistrial or a change of venue on the basis of publicity? If so, explain. Attach copies of any motions made and exhibits filed.
E. Was defendant charged with other offenses arising out of the same incident? If so, list charges; state whether they were tried at same proceeding, and give disposition.

IV. Data Concerning Sentencing Proceeding

A. List aggravating circumstance(s) upon which State relied in the pre-trial notice.

B. Was the proceeding conducted
before same judge as trial? _____
before same jury? _____
If the sentencing proceeding was conducted before a jury other than the trial jury, did the defendant challenge the selection or composition of the jury? If so, explain.

C. Counsel—If counsel at sentencing was different from trial counsel, give information requested in III C above.

D. Which aggravating and mitigating circumstances were raised by the evidence?

E. On which aggravating and mitigating circumstances were the jury instructed?

F. Sentence imposed: Life Imprisonment
Death

V. Chronology
Date of Offense
Arrest
Charge
Notification of intention to seek penalty of death
Trial (guilt/innocence)—began and ended
Post-trial Motions Disposed Of
Sentencing Proceeding—began and ended
Sentence Imposed

VI. Recommendation of Trial Court As To Whether Imposition of Sentence of Death is Justified.

VII. A copy of the Findings and Sentencing Determination made in this action is attached to and made a part of this report.

_____
Judge

CERTIFICATION

I certify that on the _____ day of _____, 19____ I sent copies of this report to counsel for the parties for comment and have attached any comments made by them to this report.

_____
Judge

Within five days after receipt of the report, the parties may submit to the judge written comments concerning the factual accuracy of the report. The judge promptly shall file with the clerk of the trial court, and in the case of a life sentence with the Clerk of the Court of Appeals the report in final form, noting any changes made, together with any comments of the parties.

Rule 4-343, As Amended Subsequent To The Decision Of The Court Of Appeals In This Case.

RULE 4-343. SENTENCING—PROCEDURE IN CAPITAL CASES

(a) **Applicability.**—This Rule applies whenever a sentence of death is sought under Code, Article 27, § 413.

(b) **Statutory Sentencing Procedure.**—When a defendent has been found guilty of murder in the first degree, the State has given the notice required under Code, Article 27, § 412(b)(1), and the defendant may be subject to a sentence of death, a separate sentencing proceeding shall be conducted as soon as practicable after the trial pursuant to the provisions of Code, Article, 27, § 413.

(e) **Form of Written Findings and Determinations.**—Except as otherwise provided in section (f) of this Rule, the findings and determinations shall be made in writing in the following form:

(CAPTION)

FINDINGS AND SENTENCING DETERMINATION

Section I

Based upon the evidence, we unanimously find that each of the following statements marked "proven" has been proved BEYOND A REASONABLE DOUBT and that each of those statements marked "not proven" has not been proven BEYOND A REASONABLE DOUBT.

1. The defendant was a principal in the first degree to the murder.

proven ☐ not proven ☐

2. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

proven ☐ not proven ☐

(If one or both of the above are marked "proven," complete Section II. If both are marked "not proven," proceed to Section V and enter "Life Imprisonment.")

Section II

Based upon the evidence, we unanimously find that each of the following aggravating circumstances that is marked "proven" has been proved BEYOND A REASONABLE DOUBT and we unanimously find that each of the aggravating circumstances marked "not proven" has not been proven BEYOND A REASONABLE DOUBT.

1. The victim was a law enforcement officer who was murdered while in the performance of the officer's duties.

proven ☐ not proven ☐

2. The defendant committed the murder at a time when confined in a correctional institution.

proven ☐ not proven ☐

3. The defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

proven ☐ not proven ☐

4. The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

proven ☐ not proven ☐

5. The victim was a child abducted in violation of Code, Article 27, § 2.

proven ☐ not proven ☐

6. The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.

proven ☐ not proven ☐

7. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

proven ☐ not proven ☐

8. At the time of the murder, the defendant was under the sentence of death or imprisonment for life.

proven ☐ not proven ☐

9. The defendant committed more than one offense of murder in the first degree arising out of the same incident.

proven ☐ not proven ☐

10. The defendant committed the murder while committing or attempting to commit robbery, arson, rape in the first degree, or sexual offense in the first degree.

proven ☐ not proven ☐

(If one or more of the above are marked "proven," complete Section III. If all of the above are marked "not proven," do not complete Sections III and IV and proceed to Section V and enter "Life Imprisonment.")

Section III

Based upon the evidence, we make the following determinations as to mitigating circumstances:

1. The defendant has not previously (i) been found guilty of a crime of violence; or (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) been granted probation on stay of entry of judgment pursuant to a charge of a crime of violence.

(As used in the preceeding paragraph, "crime of violence" means abduction, arson, escape, kidnapping, mayhem,

murder, robbery, rape in the first or second degree, sexual offense in the first or second degree, manslaughter other than involuntary manslaughter, an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.)

(Mark only one.)

- ☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.
- ☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.
- ☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

2. The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

(Mark only one.)

- ☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.
- ☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.
- ☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

3. The defendant acted under substantial duress, domination, or provocation of another person, even though not so substantial as to constitute a complete defense to the prosecution.

(Mark only one.)

- ☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.
- ☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

- ☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

4. The murder was committed while the capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance.

(Mark only one.)

- ☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.
- ☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.
- ☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

5. The defendant was of a youthful age at the time of the crime.

(Mark only one.)

- ☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.
- ☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.
- ☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

6. The act of the defendant was not the sole proximate cause of the victim's death.

(Mark only one.)

- ☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

7. It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(Mark only one.)

☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

☐ 8. (a) We unanimously find by a preponderance of the evidence that the following additional mitigating circumstances exist:

_____

_____

_____

_____

(Use reverse side if necessary)

☐ (b) One or more of us, but fewer than all 12, find by a preponderance of the evidence that the following additional mitigating circumstances exist:

_____

_____

_____

_____

(Use reverse side if necessary)

(If the jury unanimously determines in Section III that no

mitigating circumstances exist, do not complete Section IV. Proceed to Section V and enter "Death". If the jury or any juror determines that one or more mitigating circumstances exist, complete Section IV.)

Section IV

Each individual juror shall weigh the aggravating circumstances found unanimously to exist against any mitigating circumstances found unanimously to exist, as well as against any mitigating circumstances found by that individual juror to exist.

We unanimously find that the State has proved by A PREPONDERANCE OF THE EVIDENCE that the aggravating circumstances marked "proven" in Section II outweigh the mitigating circumstances in Section III.

☐ Yes ☐ No

Section V

Enter the determination of sentence either "Life Imprisonment" or "Death" according to the following instructions:

1. If both of the answers in Section I are marked "not proven," enter "Life Imprisonment."

2. If all of the answers in Section II are marked "not proven," enter "Life Imprisonment."

3. If Section III was completed and the jury unanimously determined that no mitigating circumstance exists, enter "Death."

4. If Section IV was completed and was marked "no," enter "Life Imprisonment."

5. If Section IV was completed and was marked "yes," enter "Death."

We unanimously determine the sentence to be _____

Section VI

If "Life Imprisonment" is entered in Section V, answer the following question:

Based upon the evidence, does the jury unanimously determine that the sentence of life imprisonment previously entered shall be without the possibility of parole?

☐ Yes ☐ No

Foreman	Juror 7
Juror 2	Juror 8
Juror 3	Juror 9
Juror 4	Juror 10
Juror 5	Juror 11
Juror 6	Juror 12

or _____
JUDGE

(f) **Deletions from Form.**—Unless the defendant requests otherwise, Section II of the form set forth in section (e) of this Rule shall not include any aggravating circumstance that the State has not specified in the notice required under Code, Article 27, § (b)(1) of its intention to seek a sentence of death. Section VI of the form shall not be submitted to the jury unless the State has given the notice required under Code, Article 27, § 412(b)(2) of its intention to seek a sentence of imprisonment for life without the possibility of parole.

(g) **Advice of the Judge.**—At the time of imposing sentence, the judge shall advise the defendant of the right of appeal and the time allowed for the exercise of this right. The judge shall also advise a defendant who receives a sentence of death that (1) the sentence only will be reviewed automatically by the Court of Appeals, and (2) the sentence will be stayed

pending review of the sentence by the Court of Appeals and any appeal which the defendant may take.

(h) **Report of Judge.**—After sentence is imposed, the judge promptly shall prepare and send to the parties a report in the following form:

CAPTION

REPORT OF TRIAL JUDGE

I. Data Concerning Defendant

- A. Date of Birth
- B. Sex
- C. Race
- D. Address
- E. Length of Time in Community
- F. Reputation in Community
- G. Family Situation and Background
  1. Situation at time of offense (describe defendant's living situation including marital status and number and age of children)
  2. Family history (describe family history including pertinent data about parents and siblings)
- H. Education
- I. Work Record
- J. Prior Criminal Record and Institutional History (list any prior convictions, disposition, and periods of incarceration)
- K. Military History
- L. Pertinent Physical or Mental Characteristics or History
- M. Other Significant Data About Defendant

II. Data Concerning Offense

- A. Briefly describe facts of offense (include time, place, and manner of death; weapon, if any; other participants and nature of participation)
- B. Was there any evidence that the defendant was under the influence of alcohol or drugs at the time of the offense? If so describe.

C. Did the defendant know the victim prior to the offense?
Yes ☐ No ☐
1. If so, describe relationship.
2. Did the prior relationship in any way precipitate the offense? If so, explain.

D. Did the victim's behavior in any way provoke the offense? If so, explain.

E. Data Concerning Victim
1. Name
2. Date of Birth
3. Sex
4. Race
5. Length of time in community
6. Reputation in community

F. Any Other Significant Data About Offense

III. A. Plea Entered by Defendant:
Not guilty ☐; guilty ☐;
not criminally responsible ☐

B. Mode of Trial:
Court ☐ Jury ☐
If there was a jury trial, did defendant challenge the jury selection or composition? If so, explain.

C. Counsel
1. Name
2. Address
3. Appointed or retained
(If more than one attorney represented defendant, provide data on each and include stage of proceeding at which the representation was furnished.)

D. Pre-Trial Publicity—Did defendant request a mistrial or a change of venue on the basis of publicity? If so, explain. Attach copies of any motions made and exhibits filed.

E. Was defendant charged with other offenses arising out of the same incident? If so, list charges; state whether they were tried at same proceeding, and give disposition.

IV. Data Concerning Sentencing Proceeding

A. List aggravating circumstance(s) upon which State relied in the pre-trial notice.

B. Was the proceeding conducted
before same judge as trial? _____
before same jury? _____
If the sentencing proceeding was conducted before a jury other than the trial jury, did the defendant challenge the selection or composition of the jury? If so, explain.

C. Counsel—If counsel at sentencing was different from trial counsel, give information requested in III C above.

D. Which aggravating and mitigating circumstances were raised by the evidence?

E. On which aggravating and mitigating circumstances were the jury instructed?

F. Sentence imposed: Life Imprisonment
Death
Life imprisonment without the possibility of parole

V. Chronology
Date of Offense
Arrest
Charge
Notification of intention to seek penalty of death
Trial (guilt/innocence)—began and ended
Post-trial Motions Disposed Of
Sentencing Proceeding—began and ended
Sentence Imposed

VI. Recommendation of Trial Court As To Whether Imposition of Sentence of Death is Justified.

VII. A copy of the Findings and Sentencing Determination made in this action is attached to and made a part of this report.

_____
Judge

CERTIFICATION

I certify that on the _____ day of _____, 19____ I sent copies of this report to counsel for the parties for comment and have attached any comments made by them to this report.

Judge

Within five days after receipt of the report, the parties may submit to the judge written comments concerning the factual accuracy of the report. The judge promptly shall file with the clerk of the trial court, and in the case of a life sentence with the Clerk of the Court of Appeals the report in final form, noting any changes made, together with any comments of the parties. (Amended July 27, 1987, effective Aug. 17, 1987.)